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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Review of the Policy Implications	)	MM Docket No. 91-221
of the Changing Video Marketplace	)	

To: The Commission

COMMENTS OF
FISHER BROADCASTING INC.

FISHER BROADCASTING INC.

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SUMMARY OF COMMENTS

In this proceeding, the Commission is seeking comment on the effects of several perceptible trends on the video marketplace. In making any changes to its multiple ownership and cross-ownership rules, Fisher Broadcasting Inc. ("Fisher") believes that the Commission should ensure that it continues to promote localism and diversity. Fisher believes that reasonable structural regulation is far superior to reliance on antitrust laws to define the limits of acceptable competition in the broadcast industry. The current multiple ownership rules present a reasonable balance between the potential adverse consequences of reshaping the broadcast industry and the benefits of increased concentration of ownership and should thus be retained. Similarly, common ownership of different media tends to reduce the number of independent voices available to the public and may provide opportunities to engage in anticompetitive conduct. Thus, the Commission's public interest mandate of promoting localism and diversity also requires continued enforcement of the broadcast/cable and network/cable cross-ownership rules.

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Office of the Secretary

COMMENTS OF
FISHER BROADCASTING INC.

Fisher Broadcasting Inc., licensee of stations KOMO-TV, Channel 4, Seattle, Washington, and KATU(TV), Channel 2, Portland, Oregon (hereinafter "Fisher"), by its attorneys, hereby submits its comments in the above-referenced proceeding in response to the Notice of Inquiry (hereinafter "NOI") released by the Commission on August 7, 1991.1/

I. PRELIMINARY STATEMENT

1. Fisher's stations are longstanding affiliates of the ABC Television Network. This relationship has been mutually beneficial, as well as beneficial to the public Fisher serves. Fisher has given ABC access to large populations in the Seattle and Portland areas and promoted the viewing of ABC programming among those audiences. Fisher as well has benefitted from the increased viewership generated by ABC network programming.

1/ 6 FCC Rcd 4961 (1991). Although the Commission originally established a deadline of October 22, 1991, for filing comments, the Commission extended the deadline for filing initial comments to November 21, 1991, and the deadline for filing replies to December 19, 1991. Order Granting Extension of Time, DA 91-1277 (released October 11, 1991).

Through this network/affiliate partnership, Seattle and Portland have benefitted from an abundance of local, national, and international news, public affairs, and entertainment programming. Maintaining this superior service depends heavily on ABC continuing to provide Fisher with exclusive high quality programming.

2. The Commission's NOI seeks comment on several apparent trends, including the increasing competition in, and fragmentation of, the video marketplace. In making its decision in this proceeding, the Commission should ensure that it continues to promote localism and diversity in the marketplace of ideas. This has been a linchpin of Fisher's position as expressed in Commission proceedings over the years. Due to the advent of cable and other video options, "[b]roadcast television . . . has suffered an irreversible long-term decline in audience and revenue share, which will continue throughout the current decade."[2/] Promotion of localism/diversity is an essential element of the Commission's public interest obligations. Fisher also believes that, in most instances, the Commission's multiple ownership and cross-ownership rules promote media diversity and enhance competition and should, therefore, be retained by the Commission.[3/]

2/ Office of Plans and Policy Working Paper #26, <u>Broadcast Television in a Multichannel Marketplace</u>, DA 91-817, 6 FCC Rcd 3996, 3999 (1991).

3/ However, Fisher continues to believe that elimination of the "one-to-a-market" rule in major television markets would foster continued viability of AM broadcasting, and increase program diversity.

II. ARGUMENT

A. Reasonable Structural Regulation is Superior to Reliance on Antitrust Laws to Define the Parameters of Legitimate Competition

3. The Commission's multiple ownership and cross-ownership rules are grounded upon our country's fundamental belief that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."4/ This is because the "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."5/ Indeed, the idea that the public is best served by the free trade of ideas is the genesis of the Commission's long standing policy of diversifying control of the powerful medium of broadcasting.

4. Fisher believes that structural limits on ownership make sound public policy and economic sense in the broadcast industry. Rather than allowing the limits of acceptable competition to be defined by protracted and expensive antitrust litigation, which serves neither the plaintiff nor the defendant, reasonable "go no-go" regulations provide broadcasters with a clearly defined framework in which to conduct their businesses. The businessman requires a bright line. He needs to know precisely what behavior is permissible and what is forbidden. Issue specific litigation is clearly inadequate to establish these frontiers. Thus, Fisher strongly supports the retention of

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4/ Associated Press v. United States, 326 U.S. 1, 20 (1945).

5/ United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), aff'd 326 U.S. 1 (1945).

a balanced regulatory approach to multiple and cross-ownership in the broadcast industry.

B. The Multiple Ownership Rules Represent a Reasonable Balance Between Potential Adverse Restructuring of the Broadcast Industry and Benefits of Increased Group Ownership and Should not be Further Liberalized

5. The Commission's multiple ownership rules arise out of the FCC's public interest mandate to promote the diversification of programming sources and viewpoints, and to foster maximum competition in broadcasting. The duopoly rule seeks to implement those goals on a local level by preventing a party from owning more than one station in the same broadcast service in a market. The concentration of control rules aim at achieving those goals nationally by limiting the number of stations that a party may own to twelve (12) stations in the same service and by limiting television stations from exceeding an aggregate national audience reach of twenty-five (25) percent.[6/]

6. The duopoly rule was the FCC's first limitation on multiple ownership of broadcast properties and has since been the cornerstone of the Commission's commitment to the promotion of diversity.[7/] As the Commission stated in reviewing its multiple ownership rules:

> A proper objective is the maximum diversity of ownership that technology permits in each area. We are

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6/ If minority controlled, the limits are fourteen (14) stations in the same service and television stations may not exceed an aggregate national audience reach of thirty (30) percent.

7/ The FCC's duopoly policy was first stated in Genesee Radio Corp., 5 FCC 183 (1938).

> of the view that 60 different licensees are more desirable than 50, and even that 51 are more desirable than 50. In a rapidly changing social climate, communication of ideas is vital. If a city has 60 frequencies available but they are licensed to only 50 different licensees, the number of sources for ideas is not maximized. It might be the 51st licensee that would become the communication channel for a solution to a severe local social crisis. No one can say that present licensees are broadcasting everything worthwhile that can be communicated.[8/]

This statement is as true today as it ever was. Viewpoint diversity is especially important in the local context because the number of frequencies available for licensing is limited. For an individual member of the audience, the richness of ideas to which he is exposed necessarily depends on the number of diverse views that are available to him within his local broadcast market. For these reasons, the duopoly policy should remain in place.

7. Likewise, on the national level, the Commission should be guided by the sound public policy of limiting undue concentration of the media of mass communications. The Commission's rules wisely limit the number of stations that a single entity may own nationwide. These structural rules were recently revised and were found to reflect a reasonable balance between potential adverse restructuring of the broadcast industry and the benefits of increased group ownership. Importantly, there is no reason to believe that the current rules are not sufficiently permissive. Expanding the audience reach limitation

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8/ First Report and Order, Docket 18110, 22 F.C.C.2d 306, 311 (1970).

would unnecessarily raise concerns that a single entity could hold too great a share of the national television market.

8. Similarly, while multiple station owners may have a greater capacity to provide more in-depth informational and experimental programming due to economies of scale, there is little evidence that they do so. On the other hand, inherent in unrestrained concentration of station ownership is the danger that an owner will not act in accordance with the public interest. Indeed, in the broadcast context, unbridled centralization is at odds with the traditional concern for diversity embodied in the Commission's public interest mandate. Thus, the Commission's rules concerning limiting the number of broadcasts stations that a single entity may own should not be further liberalized.

C. The Commission's Public Interest Mandate of Promoting Diversity As Well As Other Policy Goals Requires Continued Enforcement of the Broadcast/Cable and Network/Cable Cross-Ownership Rules

9. Unfettered broadcast/cable and network/cable cross-ownership raises similar diversity concerns. Common ownership of different media by definition tends to reduce the number of independent voices available to the public. Additionally, like multiple ownership, cross-ownership interests may provide incentives and opportunities to engage in conduct which ultimately limit the types of programming services that are offered, and in the case of cable, result in higher subscription rates. Thus, wisely the broadcast/cable cross-ownership rule

prohibits an entity from owning both a broadcast and a cable station in a local market, while the network/cable cross-ownership rule prevents co-ownership of a cable television system and a national television network.

10. Like the duopoly rule discussed above, the Commission adopted the broadcast/cable cross-ownership rule to further the Commission's policy favoring diversity of control over local mass communications media.[9/] Moreover, the legislative history of the Cable Communications Policy Act of 1984 (hereinafter the "Cable Act"), which codified the broadcast/cable cross-ownership limitations, explicitly provides that the rule was designed "to prevent the development of local media monopolies, and to encourage a diversity of ownership of communications outlets."[10/] Thus, Congress clearly recognized the dangers posed by cross-ownership of communications channels to the public interest in reducing the diversity of viewpoints. Perhaps most telling, by codifying the broadcast/cable cross-ownership rule in the Cable Act, no useful purpose would be served by eliminating the Commission's rule because the Commission is required to abide by the Cable Act.

11. Similarly, in promulgating the network/cable cross-ownership rule, the Commission appreciated that such cross-ownership would impose a restraint on the diversity of video programming and have an inhibiting effect on potential

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9/ Second Report and Order, Docket 18397, 23 F.C.C.2d 816 (1970), recon. denied, 39 F.C.C.2d 377 (1973).

10/ H.R. Rep. No. 934, 98th Cong., 2d Sess. 55.

programming competition. The Commission implicitly recognized the value of the network-affiliate partnership, not only to the networks and affiliates, but more importantly, to the public interest. Because the policy goals of diversity, localism in broadcasting, and free over-the-air service are inextricably related to the network-affiliate relationship, the Commission moved to protect the exclusivity of the arrangement by prohibiting co-ownership of networks and cable television systems.[11/]

12. Since that time, the networks have become involved in the programming of cable channels. If networks were allowed to control the local delivery system such that they would directly compete with their own affiliates, a potential conflict of interest would develop which would not merely devastate the network-affiliate relationship, but would also harm the viewing public. With the tremendous growth of cable television over the past decade, the network/cable cross-ownership rule is probably the most important safeguard to the survival of quality free over-the-air television service.

13. In the current video marketplace, network entry into cable television ownership, presumably through the purchase of existing systems, would decrease diversity since it would only replace pre-existing voices.[12/] Worse yet, if the networks

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11/ Second Report and Order, Docket 18397, 23 F.C.C.2d 816 (1970), recon. denied, 39 F.C.C.2d 377 (1973).

12/ Since most of the profitable areas have already been cabled, it seems unlikely that networks would build competitive systems on any significant scale. Instead, they would (continued...)

were permitted to aggregate a number of systems under their corporate banner, they would be replacing a multitude of speakers with merely one.

14. Vertical integration of a network with a local delivery system (i.e. cable), would place the network-owned cable distributor in a unique position to control the flow of programming to the benefit of the programs in which it has an equity investment, and to the detriment of the programs in which it has no interest. As a result, other programmers providing service competitive with the network's could be excluded from the system. In many instances, this would occur regardless of whether the public desired the excluded programming more than the network's cable programming. This situation disrupts the critical relationship between the content provider and the viewer. Although this reduction in diversity is already occurring to some extent among cable programming providers that own cable systems,[13/] such activity is not in the public interest and should be thwarted by the Commission whenever possible.

12/ (...continued) probably follow the same path they took when entering cable programming services and buy existing entities. Although it can be argued that a network's resources would likely improve the pre-existing system/service, there would be no increase in diversity. Thus, the Commission's goal of increasing diversity would not be furthered by eliminating the cross-ownership rule.

13/ For example, TCI, the largest multiple system operator, has financial interests in programming services such as American Movie Classics, the Discovery Channel, QVC Networks, Inc. and Encore.

15. Any benefit to cable service resulting from network ownership would be achieved at the expense of two basic and historic FCC policies: localism in broadcasting[14/] and diverse free over-the-air television service.[15/] For many years, the public has been the beneficiary of the networks' primary commitment to creating high quality programming for free over-the-air broadcast. If the network/cable cross-ownership rules were to be liberalized, however, that commitment would probably change. Should networks become the producer, programmer, and local distributor of their own programming, it is likely that the best network programming would be siphoned away from free over-the-air affiliates for use on network-owned cable systems, since a network's profit margin would be higher where the program delivery system is vertically integrated with the network.

16. Wireless cable is a perfect example of the adverse effects of vertical integration to competitors of cable. Because much of the most desired programming is affiliated with major cable providers, wireless cable operators have been unable to obtain the programming that they need to compete with cable. Although the threat of Congressional action has improved the situation somewhat, wireless cable operators are still often forced to pay up to 200% more than cable operators for identical

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14/ See Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977); Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 207, cert. denied 350 U.S. 1007 (1956).

15/ See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1440 (D.C. Cir. 1985).

programming.[16/] The network/cable cross-ownership would open the door to the same type of treatment towards affiliates and independent stations vis-a-vis network/cable operators.

17. Nevertheless, even if no programs were withheld from the affiliate, their value to the affiliate would likely be reduced by a loss of exclusivity, since the network would likely use many of the same programs for its cable programming. The loss of attractive programming, as well as any reduction in the value of network programming caused by a lack of exclusivity, would financially damage affiliated broadcast stations by reducing their audience size, and correspondingly, their advertising revenues. This would have several detrimental effects. By reducing available revenues for all affiliated stations, the ability of broadcast stations to provide good local service would be hindered.[17/] In the case of small market stations, it is likely that many would fail, since revenue produced by network affiliation is essential to their solvency.

18. A related concern is that in a world without must-carry, less attractive or non-exclusive programming could well lead to an affiliate being dropped from the local cable system. There is substantial evidence that cable operators have and will continue to deny broadcasters carriage on their systems. The results of a recent FCC study of the cable industry's behavior

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16/ Testimony of Robert Schmidt, President of the Wireless Cable Association, Senate Hearing on S.12. reprinted in S. Rep. No. 102-92, 102d Cong., 1st Sess. 14 (1991).

17/ Indeed, there is already a trend to reduce network compensation to affiliates which may have forced stations to curtail local programming.

demonstrate that the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but for those who do not subscribe to cable.[18/] The FCC's Report chronicled numerous instances where local stations were denied carriage or dropped from the cable system.[19/] Significantly, the most frequent replacement for a dropped local television station was a basic cable network, the program services in which cable operators often own equity interests and/or profit from local advertising sales.[20/]

19. Furthermore, cable operators have the ability to shift the placement of the stations which they carry. This may also have the effect of stifling competition. After building an audience on a particular cable channel, repositioning makes it difficult for subscribers to locate stations. Channel repositioning of local broadcast signals need not be the result of subscriber preference or marketplace demand. It may be done solely to enhance the competitive position of the cable operator's programming. Allowing networks to own cable systems would only exacerbate these problems.

20. Finally, any loss of local stations because of lost revenue resulting from the denial of cable carriage, loss of attractive programming, reduction in the value of network programming, or channel repositioning, would reduce the amount

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18/ "Cable System Broadcast Signal Carriage Survey," Staff Report by the Policy and Rules Division, Mass Media Bureau, Sept. 1, 1988.

19/ Id., Tables 4 and 7.

20/ Id., Table 8.

and attractiveness of free-over-the-air television to the public. This not only violates the Commission's policy goal of promoting free over-the-air television, but to the extent that stations close their doors due to the lost revenue, the diversity of voices available to that portion of the public unwilling or unable to pay for television service will be lessened.

III. CONCLUSION

In sum, Fisher believes that retention of the Commission's ownership rules is necessary to promote media diversity and effective competition. Any benefits arising out of a loosening of the ownership rules, such as economies of scale, are far outweighed by the likely loss of viewpoint diversity to the public.

Respectfully submitted,

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